

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74 1146

ORIGINAL

73-8435

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 73-8435

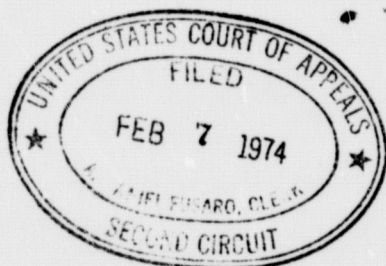
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

ROBERT MAHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



GUSTAVE H. NEWMAN
Attorney for Defendant-Appellant
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New York, New York 10036
682-4066

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DOCKET ENTRIES
CRIMINAL DOCKET
UNITED STATES DISTRICT COURT
73 CR 970

UNITED STATES OF AMERICA

vs.

ANGELO TRABACCHI	1, 3
ROBERT MAHER	1, 5
ELIGIO MATOS	1
CHARLES DANCIL	1

PROCEEDINGS

DATE

- 11leg. Filed indictment and ordered sealed. Bench Warrant ordered. MacMahon, J. B/W issued.
- 11leg. Indictment opened on motion of Government and assigned to Judge MacMahon. Deft. Robert Maher (atty. present) Pleads not guilty. Pre-trial conference set for 10-26-73 at 10 A.M.
- 11leg. ROBERT MAHER - Filed notice of motion to dismiss indictment.
- 11leg. ROBERT MAHER - Filed Informal request for particulars, discovery and inspection.
- 11-14-73 ROBERT MAHER - Filed MEMO END on informal request for particulars. Motion granted to extent consent indicated in the record. Ordered. MacMahon, J.
- 11-14-73 ROBERT MAHER - Filed MEMO END on motion to dismiss indictment. Motion denied following argument. So Ordered. MacMAHON, J.

11-12-73 Jury Trial begun before MacMAHON, J.

11-13-73 Trial cont'd.

11-14-73 Trial cont'd.

11-15-73 Trial cont'd. and concluded. Jury finds Deft. MAHER guilty on cts. 4 & 5. Deft. remanded. Jury unable to reach verdict on cts. 1, 2 & 3. Court declares mistrial. Case to be re-assigned.

11-30-73 ANGELO TRABACCHI & ROBERT MAHER - Filed the following papers, received from the U. S. Magistrate:
Docket Entry Sheets (2) & Indictment Warrant, Notice of appearance by Washer & Washer, 16 Court Street, Brooklyn, N.Y. Tr 5-1292, ROBERT MAHER - Appearance bond in the amt. of \$25,000.

12-18-73 ROBERT MAHER - Filed Notice of Appeal from judgment rendered on December 18-73.(illeg.)

12-19-73 Case reassigned to Judge Metzner.

12-19-73 Robert Maher : Filed Judgment #74,019 ----- that the deft. is hereby committed to custody of the Atty. Gen. for imprisonment for a period of 10 years on each of count 4 & 5 to run concurrently with each other and fined \$5,000.00 on each of count 4 & 5 to run concurrently with each other. Total Fine \$85,000.00 to be paid or the deft. is to stand committed until Fine is Paid or he is otherwise discharge(sic) according to Law. MacMahon, J.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

/s/ Raymond F. Burghardt
Deputy Clerk

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-v-

No. 73-8435

ANGELO TRABACCHI, ROBERT MAHER,
ELIGIO MATOS and CHARLES DANCIL,

Defendants.

-----x

The Grand Jury Charges:

From on or about the 1st day of January, 1968 and continuously thereafter up to and including the 1st day of January, 1973, in the Southern District of New York, ANGELO TRABACCHI, ROBERT MAHER, ELIGIO MATOS and CHARLES DANCIL, the defendants and AUGUSTO CESAR KORTRIGHT, SANTIAGO OLIVERO and JOAQUIN QUINONES, named herein as co-conspirators but not as defendants and others to the Grand Jury known and unknown unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code and Sections 812, 841(a)(1) and 841(b)(1) (A) of Title 21, United States Code.

It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact

amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1) (A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about the winter of 1968, defendant ANGELO TRABACCHI met with co-conspirator Santiago Olivero.
2. In or about the spring of 1969, defendants ANGELO TRABACCHI and ROBERT MAHER met with co-conspirator Santiago Olivero.
3. In or about October 1969, defendants ANGELO TRABACCHI and ROBERT MAHER met with co-conspirator Santiago Olivero.

4. In or about October, 1969, defendant ROBERT MAHER delivered one kilogram of heroin.

5. In or about November, 1969, defendant ROBERT MAHER delivered one kilogram of heroin.

6. In or about February, 1971, defendant ROBERT MAHER delivered two kilograms of heroin.

7. In or about March, 1971, defendant ELIGIO MATOS and co-conspirator Santiago Olivero drove to Bronx, New York.

8. In or about May, 1971, defendant ELIGIO MATOS "cut" a quantity of heroin.

9. In or about October, 1971, defendant CHARLES DANCIL met with co-conspirator Santiago Olivero.

10. On or about November 2, 1971, defendant CHARLES DANCIL paid the approximate sum of \$12,000 to co-conspirator Joaquin Quinones.

(Title 21, United States Code, Sections 173 and 174; Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of October, 1969, in the Southern District of New York, ANGELO TRABACHHI and ROBERT MAHER, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately one kilogram of heroin after the said narcotic drug had been

imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code, Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or about the month of November, 1969, in the Southern District of New York, ANGELO TRABACCHI and ROBERT MAHER, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately one kilogram of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to

provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code, Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

In or about the month of February, 1971, in the Southern District of New York, ROBERT MAHER, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately two kilograms of heroin after the said narcotic drug had been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

COUNT FIVE

The Grand Jury further charges:

In or about the month of March, 1971, in the Southern District of New York, ROBERT MAHER, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and

facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately one kilogram of heroin after the said narcotic drug had been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

PAUL J. CURRAN
United States Attorney

MOTION TO DISMISS INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-against-

Indictment No. 73 CR 791

ANGELO TRABACCHI, ROBERT MAHER,
ELIGIO MATOS and CHARLES DANCIL,

Defendants.

-----x

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of PAUL A. VICTOR, sworn to on the 29th day of October, 1973, and upon the indictment and all of the proceedings heretofore had herein, the defendant, ROBERT MAHER, will move this Court at a term thereof, before HON. LLOYD F. MACMAHON on the 5th day of November, at the United States Courthouse, Foley Square, City and State of New York, for an order:

1. To dismiss the indictment as violative the Fifth Amendment guarantee against double jeopardy; or in the alternative

2. Invoking the principle of collateral estoppel and thereby prohibiting the Government from using testimony or other evidence which relate to issues already litigated in prior trials;

3. And for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 29, 1973.

Yours, etc.

PAUL A VICTOR
Attorney for Defendant
ROBERT MAHER
67 Wall Street
New York, New York 1005
[212] 943-0880

AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-against-

Indictment No. 73 CR 791

ANGELO TRABACCHI, ROBERT MAHER,
ELIGIO MATOS and CHARLES DANCIL,

Defendants.

-----x

STATE OF NEW YORK)
COUNTY OF BRONX) ss.:

PAUL A. VICTOR, being duly sworn, deposes and says:

1. That I am the attorney for the defendant ROBERT MAHER and I make this affidavit in support of the within motion dealing with the double jeopardy and collateral estoppel issues.

THE PRESENT INDICTMENT

2. The aforesaid indictment herein charges the defendant with various violations of the United States Code dealing with narcotics, to wit:

COUNT ONE- charges the defendant ROBERT MAHER and six other named persons (to wit, ANGELO TRABACCHI, ELIGIO MATOS, CHARLES DANCIL, AUGUSTO CESAR KORTRIGHT, SANTIAGO OLIVERO and JOSQUIN (sic)QUINONES) with a conspiracy to violate Title 21, Sections 173, 174, 812, 841(a)(1) and 841(b)(1)(A)

COUNT TWO - charges the defendants ROBERT MAHER and ANGELO TRABACCHI with violations of Title 21 Sections

173 and 174 in that they did in October of 1969 unlawfully receive, conceal, sell and transport heroin.

COUNT THREE - charges the defendants ROBERT MAHER and ANGELO TRABACCHI with a similar offense as COUNT TWO except that it is alleged to have occurred in November of 1965.

COUNT FOUR - charges the defendant ROBERT MAHER alone with a similar offense as COUNTS TWO and THREE except that it is alleged to have occurred in February, 1971.

COUNT FIVE - charges the defendant ROBERT MAHER alone with a similar offense as COUNTS TWO, THREE and FOUR, except that it is alleged to have occurred in March of 1971.

3. It should be noted at the outset that although COUNT ONE of the within indictment charges a conspiracy lasting from January 1st, 1968 to January 1st, 1973, neither the overt acts section of said conspiracy, nor the substantive counts of said indictment allege any unlawful act occurring later than March of 1971. In addition thereto the indictment sets forth no specificity as to the time, date, place and persons present on each occasion. It would appear, therefore, that said indictment is fatally vague (United States v. Agone 302 F.2d 1258). In any event a request for particulars, discovery and inspection has been served upon the Government and defense counsel awaits an answer thereto.

PAST INDICTMENTS AND TRIALS

4. On March 23, 1971 the defendant ROBERT MAHER was arrested, and thereafter indicted, in Bronx County and

Kings County with various violations of the narcotics law,
to wit:

Kings County Indictment #1874/71

First Count - charges the defendant
ROBERT MAHER and defendants SANTIAGO
OLIVERO and JOSQUIN (sic) QUINONES with
Criminal Possession of a Dangerous Drug
in the First Degree on March 19, 1971.
If convicted under this count defendant
would have received a mandatory life im-
prisonment sentence.

Second Count - charges the same three
defendants with conspiracy in the
Second Degree dealing with the possession
and sale of heroin between March 12, 1971,
and March 23, 1971. Four overt acts are
set forth in connection with said con-
spiracy.

[A copy of said indictment is annexed
hereto as Exhibit A]

Bronx County Indictment #1693/71

First Count - charges the defendant ROBERT
MAHER alone with possession of a weapon as
a felony on March 23, 1973.

Second Count - charges the defendant ROBERT
MAHER alone with Criminal Possession of a

Dangerous Drug in the Sixth Degree on
March 23, 1971.

[A copy of said indictment is annexed
hereto as Exhibit B]

5. On December 14, 1971 a jury in Bronx County rendered a verdict of not guilty on each of the two counts set forth in the Bronx Indictment aforesaid.

On January 14, 1972, after a jury trial had been commenced, and at the conclusion of the People's case, the Court (HON. JUSTICE MCGROVER) entered a trial order of dismissal pursuant to the provision of the New York Criminal Procedure Law Section 290.10 since the People's case was not legally sufficient to establish the offense charged therein or any lesser included offense. No appeal was taken by the People from this dismissal.

DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

6. It should be noted that the aforesaid Bronx and Kings County indictments charge violations of the narcotic laws during periods of time incorporated within the within indictment, and that the defendant ROBERT MAHER is charged not only with possession of drugs, but also with a conspiracy with two of the defendants with whom he is charged in the within indictment, with having conspired.

7. It is firmly believed that not only is there an identity of dates and persons, but that the Government herein will rely on essentially the same evidence that was used on the prior Bronx and Kings County Indictments. It is well settled that, where a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution for the same offense alleged as having been committed within a period which overlaps any part of the former period. [Short v. United States 91 F. 2d 614 at 620]. [See also Criminal Law 21 Am. Jur. 2d Sections 182, 183 and 184]. In any event the identity of issues and evidence in the present case with the former prosecutions will be somewhat clarified subsequent to service upon defense counsel of an answer to a written request for particulars, discovery and inspection heretofore served upon the Government. Apart from said particulars however, in order to best determine how the prior trials bear upon the case at bar, it is respectfully requested that the Court look not only to the pleadings and particulars served but also the record in each prior trial.

8. Defense counsel is well aware of certain decisions of the United States Supreme Court (to wit, Bartkus v. Illinois 359 U.S. 121 (1959) and Abbate v. United States, 359 U.S. 187 (1959) which rely upon a dual sovereignties theory and therefore hold that the Bill of Rights guarantee against double

jeopardy is applicable to a single sovereign only, and therefore not binding upon the Federal Courts subsequent to a State Court acquittal. However these decisions have been the subject of considerable erosion and criticism. (See, e.g., Fisher, Double Jeopardy, Two Sovereignities and the Intruding Constitution, 28 U. Chi. L. Rev. 591 (1961); Pontikes, Dual Sovereignty and Double Jeopardy, 14 Wes. Res. L. Rev. 700 (1963); Notes, 44 Minn. L. Rev. 534, 538 (1960); 80 Harv. L. Rev. 1538 (1967); and even the United States Supreme Court has cast doubt upon the rationale of those cases by rejection of the "dual sovereignties approach" in cases dealing with search and seizure and constitutional privilege against self incrimination. [Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Elkins v. United States, 364 U.S. 206, dealing with the discarding of the "silver platter doctrine"; and see also State v. Fletcher, 15 Ohio Misc. 336, 240 N.E. 2d 905; People v. LoCicero, 14 N.Y. 2d 374, 251 NYS 2d 953, 956].

9. In any event it is believed that, apart from the rationale of the aforesaid decisions, the United States Attorney for the Southern District of New York, did not, as is apparently required, obtain the prior approval of the Attorney General for permission to proceed with this indictment and trial. In this connection, I wish to call the Court's attention to a memorandum issued to all United States Attorneys by the Attorney General Rogers shortly after the

Bartkus and Abbate decisions. It stated that:

"It is our duty to observe not only the rulings of the Court but the rulings as well. In effect the Court said [in Bartkus and Abbate] that although the rule . . . is sound law, enforcement officials should use care in applying it. * * * We should continue to make every effort to cooperate with State and Local authorities to the end that the trial occur in the jurisdiction, whether it be State or Federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of State and Federal Law Enforcement Authorities, then consideration of a second prosecution should seldom arise. In such event, I doubt that it is wise to formulate detailed rules * * *. However, no Federal case should be tried when there has already been a State prosecution for substantially the same act or acts without * * * [the approval of an Assistant Attorney General after consultation with the Attorney General]."
N.Y. Times, April 6, 1959, p.1, col. 4, p. 19, cols. 1,2.

This policy has apparently been followed by subsequent administrations and has served as the basis for dismissal of convictions in several cases where prosecutions were inadvertently initiated after State prosecutions.

[See, Petite v. United States, 361 U.S. 529 (1960), Marakar v. United States, 370 U.S. 723 (1962); Orlando v. United States, 387 F.2d 348 (9th Cir.) 1967]. In the case at bar the Assistant United States Attorney appearing in Court on October 26th, 1973 was not aware of the prior prosecutions and stated that he would look into the matter.

10. As noted, supra, the defendant ROBERT MAHER has already been subjected to two prior trials, and the possibility of a sentence of life Imprisonment and is now being required to "run the gantlet" a third time for essentially the same offenses previously charged. The present indictment seems violative not only of the Fifth Amendment prohibition against "double jeopardy" but also a violation of due process, fundamental fairness and in essence it is subjecting defendant ROBERT MAHER to cruel and unusual punishment. In Green v. United States, 355 U.S. 184, 187-88, the Court noted "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

11. In any event, even if the Court is not inclined to invoke the "double jeopardy" rule to this indictment or any part thereof, it is respectfully requested that the Court consider the doctrine of collateral estoppel, and thereby preclude the Government from using any testimony or other evidence which relate to issues already litigated in the prior trials. Collateral estoppel has been an established rule of Federal Criminal Law for more than 50 years, and the "federal decisions have made clear that the rule of collateral

estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality" [Ashe v. Swenson, 397 U.S. 436; United States v. Kramer, 289 F.2d 909].

WHEREFORE, it is respectfully requested that an order be made and entered (1) dismissing the indictment as violative of the Fifth Amendment guarantee against double jeopardy, or in the alternative (2) invoking the principle of collateral estoppel and thereby prohibiting the Government from using testimony or other evidence which relate to issues already litigated in prior trials, (3) and for such other and further relief as to this Court may seem just and proper.

Sworn to before me this
29th day of October, 1973.

PAUL A. VICTOR

S/ Marie Piccone
Commissioner of Deeds

THE CLERK: United States of America v. Angelo Trabacchi and Robert Maher.

Is the government ready?

MR. LAVIN: The government is ready.

THE CLERK: Is the defendant Trabacchi ready?

MR. BOBICK: Your Honor, he is represented by counsel, Edward Bobick.

We have submitted five motions. They were served on Friday, and I think, your Honor, that justice requires that this matter be adjourned, and I say as follows:

The defendant Angelo Trabacchi, who has never been convicted of a crime before, and is incarcerated, was arrested on or about October 18, 1973. He is charged in a five-count indictment with one charge of conspiracy and two counts of substantive violations.

These substantive violations accuse this defendant of committing a crime in the year 1968 and the year 1969.

The 3500 material, which is rather voluminous, to such an extent that we had one of the attorneys in the firm working on it and taping for approximately four hours, trying to tape the 3500 material so we could be prepared, indicates the fact, your Honor, that in 1969 there is a severance, if the undercover agent or the informant could be believed, that in 1969 this defendant had nothing to do

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with the case thereafter.

At which point, your Honor, we now find that on a case where the government has waited four and possibly five years, they are all of a sudden arresting this defendant on October 18, 1973, and placing the defendant to the necessity of going to trial less than 30 days after the date of the arrest.

While speedy justice is a good point, and while speedy justice is required, because justice delayed is justice denied, but speed that fast would be denying this defendant the right to go into and prepare a proper defense.

THE COURT: This defendant appeared before the court very shortly after his arraignment. He neglected, although he stated that he had funds, to retain counsel. The court found it necessary to recall him twice and warn him to get counsel, and I understand, Mr. Bobick, that he retained you some time last week?

MR. BOBICK: Correct, your Honor.

THE COURT: As I recall it, it was about Tuesday, am I correct?

MR. BOBICK: Tuesday or Wednesday, yes, your Honor.

THE COURT: Of course, we can't delay trials. The

defendant is entitled to a speedy trial if he is incarcerated, and particularly in a jury case, he is entitled to a speedy trial.

And, of course, his co-defendant is entitled to a speedy trial. His co-defendant has had counsel and has had no objection whatever to proceeding to trial on this date.

Where is Mr. Victor?

MR. BOBICK: He is not in here your Honor. He has been substituted.

MR. RUSSO: Your Honor, my name is Stephen Russo of the firm of Russo, Dubin & Goldberg.

Your Honor, this defendant initially at the time of his arraignment was represented by a Mr. Tobias Russo, no relation to myself, who suffered a heart attack shortly after the defendant's arraignment on the charges.

The case at that time was then referred to his associate, Mr. Paul Victor.

Last week, to be exact, last Thursday, Mr. Maher contacted me and indicated he wanted to retain my services to represent him at the time of trial. I spoke with him on Thursday afternoon, and immediately thereafter I went down to advise Mr. Victor of the fact that Mr. Maher had indicated he wished me to represent him.

Mr. Victor at that time called chambers and the United States Attorney --

THE COURT: Yes, the court was away, but I did not consent and will not consent to any such substitution. Get Mr. Victor up here to represent this defendant. You can remain if you wish, but I am not consenting to it, especially when you apparently have an application to adjourn this. No.

MR. RUSSO: Your Honor, if I may be heard on this, please?

THE COURT: I have heard you.

MR. RUSSO: I have some other things I would like to say, your Honor.

THE COURT: Go ahead.

MR. RUSSO: On Friday I contacted Mr. Lavin and appeared at the United States Attorney's office for the purpose of reviewing the 3500 material. Mr. Lavin accorded me access to a portion of the 3500 material. He denied me access to a substantial portion of it, the balance of which I received this morning.

This indictment also charges this defendant with crimes allegedly occurring in 1968 and 1969. I am aware of certain witnesses that the defendant wishes to produce. I have not been able to reach them, your Honor.

I am asking for a very brief adjournment.

Your Honor, I am in a position where I can try the case. I am conversant with the essential facts, but it is a somewhat complex situation involving multiple transactions dating back four and five years ago.

Moreover, there is a substantial amount of pre-trial materials which Mr. Lavin has just given me; and finally your Honor is aware of a motion made by my predecessor concerning the issue of double jeopardy, which your Honor has already ruled upon. There have been previous trials, your Honor, in this matter on related transactions.

The defendant has never been convicted. He was acquitted on one occasion, and the case was dismissed in Brooklyn on a directed verdict of acquittal.

Your Honor, all these factors I think point to the point that this is a somewhat unusual situation which warrants some investigation.

Now, your Honor, I am not asking for a lengthy adjournment. I am not asking for anything more than an opportunity to fully acquaint myself with the facts in this case to prepare for my client's defense. I am asking for an adjournment of no more than a week.

THE COURT: What do you say?

MR. LAVIN: Your Honor, if I might add something--

MR. RUSSO: Just one other thing, your Honor --
I don't mean to interrupt the United States Attorney --
and that is I understand that the principal witnesses for
the government are presently in custody, and there is no
danger of the court or the district attorney losing these
witnesses.

I think, your Honor, my request is reasonable
and I most respectfully request --

THE COURT: Your request is not reasonable, not
at all. Coming into court on the eve of trial and asking
for an adjournment just is not reasonable at all.

MR. LAVIN: Your Honor, there is a lot of 3500
material, and the government is aware of that. So to
insure that the defendants were fully apprised of it, I
began to let them review 3500 material all last week. Mr.
Victor has seen everything except a small portion of it,
and Mr. Bobick's office came in and tape recorded it, and
if your Honor would like --

THE COURT: Ordinarily they are not entitled to
3500 material until after the witness testifies, and
they both know that.

No, I deny the application.

MR. RUSSO: Exception, your Honor.

MR. BOBICK: Your Honor, there were certain motions

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2 that were made. One of the motions is addressed to the
3 dismissal of the indictment based on the decisions that came
4 down.

5 THE COURT: I will hear the motions now.

6 MR. BOBICK: Your Honor, so I wouldn't have to
7 repeat the facts involved in this case, it is understood
8 once is enough.

9 The decisions appear in Ross v. United States --

10 THE COURT: What is the motion?

11 MR. BOBICK: The motion is to dismiss the indictment
12 on the grounds that the government is guilty of laches and
13 depriving the defendant of his right to a trial by failing
14 to indict this defendant within a reasonable time after
15 the alleged crime was committed.

16 THE COURT: Is the motion on the ground that the
17 government has denied him a speedy trial?

18 MR. BOBICK: The fact that they are asking him
19 now to defend himself --

20 THE COURT: Mr. Bobick, I am simply trying to
21 understand the basis of your motion. Is it that the
22 government has denied this defendant a speedy trial?

23 MR. BOBICK: Yes, your Honor. And on the basis
24 of the fact that the alleged violation took place approxi-
25 mately five years before the date of the arrest, and that

1 slh

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2 at this point there is absolutely no showing by the govern-
3 ment of any continuing investigation; there is no showing
4 by the government of the fact that there was any reason
5 for the delay between the alleged time of the occurrence
6 and the alleged time of the arrest; and that even according
7 to the 3500 material given to us, your Honor, according
8 to the 3500 material the information that the government
9 has at the present time was available to them back in 1971.

10 So that under any circumstances there had to be
11 a minimum of two years between the time that the government
12 had the facts and the investigation and the time they made
13 the arrest.

14 The cases on the point, your Honor, I believe
15 are available to the court: Ross v. U.S., 249 Fed. 2d, 210;
16 Woody v. United States, 370 Fed. 2d, 214; United States v.
17 Nepue, 401 Fed. 2d, 107; and Jones v. United States, 402 Fed.
18 2d, 639.

19 And I also, your Honor, distinguish very clearly
20 between United States v. Marlam, which does not apply in this
21 case, because the situation in this case was that the alleged
22 material involved in this case was known to the government
23 completely in 1971; that the witness, who was the prime witness,
24 the witness that was used, was available to the government
25 since 1971, and there has been no overt act even alleged. The

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2 last overt act charged, your Honor, in the whole conspiracy
3 is charged in 1970 or 1971.

4 Your Honor, I have a further point, and the point
5 is this, that the defendant would certainly be unable to
6 find out and dispute any date at this point with such short
7 notice. They have to be tied together, the motion for the
8 adjournment and the motion to dismiss.

9 Arguendo that this case arose or is charged
10 against this defendant with transactions that allegedly took
11 place in 1969. Part of the problem has to be, and statements
12 do contend that in 1969 and 1968 he was at a certain place
13 at a certain time. For us, your Honor, to go back to determine
14 and find where he was on those dates, if, in fact, he was
15 even in the city, would be something that requires time.

16 Now, I know, your Honor, that the court is doing
17 what it is supposed to do, to try cases, but, your Honor, in
18 this case the defendant is in; the witnesses are in.

19 Now, I have a personal matter, a personal reason
20 for delay until right after Thanksgiving, but on the 26th,
21 which is two weeks from today, we would be prepared and at
22 your service to continue with the trial of this case, and,
23 your Honor, we would use the time most beneficially for
24 the defendant in this case.

25 Like the court has pointed out, we were retained

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2 last Tuesday or Wednesday, and I have worked diligently,
3 and spent many hours on it, and I just ask that a two-week
4 adjournment is not for the purpose of delay, and it would
5 be approximately 37 days from the day of arrest to the day
6 of trial.

7 THE COURT: Motion denied.

8 MR. RUSSO: Your Honor, for the record I would join
9 in the motion of Mr. Bobick, the motion to dismiss the in-
10 dictment.

11 THE COURT: Denied.

12 I want your other motions.

13 MR. BOBICK: Two of them, your Honor, deal with
14 bills of particulars. One of them, we never received a state-
15 ment from the government whether or not there are any tape
16 recordings or photographs. We want a copy of the photographs
17 and we want to know whether there are any tapes.

18 THE COURT: Are there any?

19 MR. LAVIN: Your Honor, the government has no
20 knowledge of any tapes. We checked with the Department of
21 Justice and we have not received word.

22 THE COURT: What else do you want?

23 MR. BOBICK: Well, your Honor, the bills of
24 particulars were rather extensive --

25 THE COURT: What do you want that the government

(In the courtroom in the presence of the jury.)

THE COURT: We have now come to the point where it is my function to instruct you on the law that applies to this case, and it is your duty to accept the law as I give it to you, whether or not you agree with it; and it is your duty to apply the law to the facts as you find them.

In short I am the exclusive judge of the law; you are the exclusive judges of the facts. You and you alone decide what weight, what effect, and what value you will give to the evidence, whether or not to believe a witness, and, of course, ultimately, the guilt or innocence of these defendants in this case.

You are not to conclude from any rulings that I have made throughout this trial or any questions that I have asked, that I have any opinion one way or the other as to the guilt or innocence of either of these defendants. That decision is entirely and exclusively up to you.

How do you go about finding the facts. Finding the facts is merely a process by which you, the jury, consider the exhibits which have been received in evidence and the testimony of all of the witnesses on both direct and on cross examination

Sift out what you believe; weigh it in the scale of your reasoning powers, and draw such conclusions as your

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experience and your common sense tell you the evidence supports and justifies; and decide just where the truth lies in this case.

Now, in this connection, all evidence is of two general types: direct evidence and circumstantial evidence. Evidence is direct when the facts are shown by exhibits which have been admitted into evidence, or when sworn to by witnesses who have actual knowledge based on one of their senses; something that they have seen; something that they have heard; something they have smelled, and so forth.

Circumstantial evidence simply means the drawing of a logical conclusion or inference from other facts which have been seen or heard or proved by direct evidence.

The classic example of circumstantial evidence is Robinson Crusoe's conclusion that there was a man on the island, from observing the footprint. The footprint was direct evidence; he could see that. Circumstantial evidence was the conclusion that it was a man.

Of course, not all circumstantial evidence knocks you down to that conclusion as that one did, but I think it will suffice. It is a process we all use in our daily lives and the process is no different here, the drawing of logical conclusions from other facts.

No greater degree of certainty is required when

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try to pinpoint what you want, and it will take us sometime to find it. Then you will get it. But I would ask you first because this is a slow process, first to try to remember it so that you get the whole picture as you discuss it among yourselves.

In this connection, you should bear in mind that questions by counsel are not evidence unless the witness agrees with what the lawyer says in his question. One of your most important functions is to determine just where the truth lies.

It is your exclusive function to decide which witnesses you will believe, and this is so as to every witness, whether called by the government or by the defense. You are not to be influenced by the number of witnesses called by either side, or by the number of documents received in evidence. You are concerned not with the quantity of the evidence, but with the quality of the evidence.

The first test which you should apply in determining the trustworthiness of a witness is to measure what he says against your plain, everyday common sense. You are not bound to believe unreasonable statements or to accept statements that insult your intelligence, just because a witness has testified to them under oath in a courtroom.

You saw the witnesses in this case. In deciding

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2 evidence is circumstantial than when it is direct, for in
3 either case you must be convinced beyond a reasonable doubt
4 before you can find a defendant guilty.

5 It is your memory of the evidence that controls.
6 It is not the way I remember it; it is not the way counsel
7 remember it. If your memory squares with the lawyers' memory,
8 you may accept their version of the evidence. But to the
9 extent that you have a different memory, you are bound by
10 your oath to rely on your own memory.

11 In this connection, sometimes juries are out only
12 a little while and they send in a note, "we want to hear the
13 testimony of this witness or the testimony of that witness,"
14 when they really haven't tried to remember it at all. You
15 should rely on your memory as much as you can. If you cannot
16 remember it, maybe one of your fellow jurors can, and just
17 his memory of it will help you stimulate your own memory.

18 If, in the end, you cannot remember it and you do
19 want it read, then the Court will have the court reporter
20 read it to you. It isn't transcribed at this point. You
21 will have to come into the jury box, tell me what you want,
22 and it will be read.

23 You address the Court through your Foreman. And
24 if you want any testimony read, remember, you have to hear
25 it not only on direct, but on cross-examination as well. So

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whether to believe a witness, you should consider his conduct or her conduct, and ~~his~~ manner on the stand. I saw you watching these witnesses with particular care as they were testifying. Obviously, you were sizing them up, **just** the way you do when you deal with people in your everyday lives.

You make impressions, you form impressions on whether you can rely on this person; can you trust **him**.. You were doing that as you watched these witnesses, just as you should. Size them up.

How did the witness impress you? Was the witness frank and honest and candid **with you**? Was the witness being evasive? Was his version of the facts straightforward? Was he trying to conceal some of the facts? Was ~~his~~ story too good to be true? Was the witness just parroting answers? Does the witness have any motive to testify falsely? ~~Is~~ the witness interested in the outcome of this case in any way? How strong or weak was the witness' memory of important events?

In short, can you rely on this witness? Can you trust him or her? Did the witness show any bias or hostility or unfriendliness toward either side?

You are to consider also the witness' opportunity to know the facts about which the witness testified and the probability or the improbability of what the witness said.

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2 Probably more significant than anything else is,
3 how does the testimony check out with the other facts and
4 with the documentary evidence, and how does it add up when
5 it is considered with all the evidence in the case and the
6 testimony of the other witnesses. Are there any inconsis-
7 tencies in the witness' testimony? And, if so, how important
8 are they? Has the witness made any inconsistent statement
9 on some earlier occasion or made some inconsistent statement
10 in a report on some earlier occasion? And, if so, how
11 important is that inconsistency?

12 In determining whether there was such an incon-
13 sistency, you should consider not only what the witness said
14 on the earlier occasion, but also what he failed to say or
15 what he omitted to say on the earlier occasion.

16 The witness Doris Olivero testified that she had
17 been convicted of prostitution and a number of other crimes,
18 as I recall. You should consider the fact that she has been
19 convicted of a crime in determining her credibility and the
20 weight to be given to her testimony. But, obviously, the mere
21 fact that she has been convicted of a crime doesn't mean that
22 she is incapable of telling the truth. It is simply a fact
23 that you should consider.

24 Doris Olivero also testified that she had partici-
25 pated in the crime charged here. If you believe that, then

1 she was an accomplice, and you should consider that fact in
2 testing her credibility and in weighing her testimony.

3 Obviously, again, a witness is not incapable of telling the
4 truth about what occurred just because she is an accomplice.
5 But you must examine her testimony with special care and
6 act upon it with caution.

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8 In the prosecution of a crime the government is
9 frequently called upon to use informers or persons who are
10 accomplices. Often it has no choice at all. They are prop-
11 erly used. After all, the government must rely upon witnesses
12 to ~~transactions, whoever they are.~~ Otherwise, in many instances,
13 it would be difficult to detect and to prosecute wrongdoers.

14 And this is particularly so in cases involving
15 conspiracy. Frequently it happens that only those on the
16 inside of the conspiracy can give evidence which is material
17 and important to the case. There is no requirement that the
18 testimony of an accomplice like Doris Olivero be corroborated,
19 that is, supported or backed up, by other evidence. A conviction
20 may rest upon the testimony of an accomplice alone, if you
21 believe it.

22 The credibility of Doris Olivero, like that of all
23 the other witnesses is for you and for you alone to decide,
24 taking into account any interest she has in the outcome of
25 this case, her motives, if any, any inducement or consideration

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2 she may have received or ~~hopes~~ to receive from the government,
3 any hostility that she may bear toward any defendant, and
4 any other evidence you recall which may reasonably be
5 considered by you to influence and color her testimony.

6 The defendants Angelo Trabacchi and Robert Maher
7 both testified as witnesses in their own behalf. Neither was
8 required by law to do so, and each appearance as a witness
9 was entirely voluntary on his part. If he had not testified,
10 his failure to do so could not have been considered by you
11 in any manner in determining his guilt or innocence.

12 But, having chosen to testify, the law requires
13 that his testimony be judged and evaluated by the same
14 standards applied to the testimony of any other witness,
15 giving consideration, of course, to his background, to his
16 personality, to his manner on the stand, and to his
17 natural interest in the outcome of this trial.

18 If you find that any witness has deliberately and
19 wilfully lied with respect to any material fact in his or
20 her testimony offered at this trial, you may follow either
21 one of two courses: you may accept as ~~much~~ of the witness'
22 testimony as you believe, or, if you wish, you may reject
23 his or her entire testimony.

24 I have spent considerable time on the standards
25 and the rules for determining credibility of witnesses,
because in this case there are sharp issues turning on the

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2 credibility of the witnesses.

3 Before discussing the crimes charged here, I want
4 to remind you, as I did at the time you were selected to
5 serve on this jury, that an indictment is merely an accu-
6 sation. It is not evidence of the truth of the charge made,
7 and you are to draw no inference of guilt from the mere fact
8 that a defendant has been indicted.

9 An indictment simply means that the defendant has
10 been accused. It means no more and no less.

11 Each defendant has denied the charge made against
12 him by his plea of not guilty and also by his testimony on
13 the witness stand. The defendant has no burden of proof in
14 this case. He is under no obligation to produce any witnesses.
15 He is presumed to be innocent, and this presumption of inno-
16 cence continues throughout the trial and during the deliber-
17 ations of the jury.

18 The presumption of innocence is overcome when and
19 only when the government establishes the guilt of a defendant
20 beyond a reasonable doubt.

21 What do I mean by beyond a reasonable doubt? As
22 the phrase implies, a reasonable doubt is a doubt that is
23 based upon reason, a reason which appears in the evidence or
24 lack of evidence. It is not some vague, speculative, imaginary
25 doubt, nor a doubt based upon emotion, sympathy, or prejudice,

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or upon what some juror might regard as an unpleasant duty.

The government is not required to prove a defendant guilty beyond every possible doubt, nor to an absolute or mathematical certainty, because such measure of proof is usually impossible in human affairs.

You should review the evidence as you remember it. Discuss it with your fellow jurors. Sift out what you believe. Weigh and compare your view of the evidence with your fellow jurors. And if that process produces a solemn belief or conviction in your mind, such as you would be willing to act upon without hesitation if this were an important matter of your own, then you may say that you have been convinced beyond a reasonable doubt.

On the other hand, if your mind is wavering or so uncertain that you would hesitate before acting if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and you must render a verdict of not guilty.

The indictment in this case contains 5 counts. Each of these counts charges a separate offense or crime, and each must be considered separately. To help you in that process, the Court will give your Foreman when you retire a copy of the indictment to guide you through your deliberations.

The indictment names four defendants, Angelo

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2 Trabacchi, Robert Maher, Eligio Matos, and Charles Dancil.

3 Only two, Angelo Trabacchi and Robert Maher, are on trial

4 before you, and you are not to speculate anything at all about

5 the other two. Only Trabacchi and Maher are the only persons

6 whose guilt or innocence you must announce in your verdict,

7 although, as I will explain to you shortly, in considering

8 their guilt or innocence, you may have to determine the

9 nature of the participation, if any, of the other persons named

10 in the indictment, not only as defendants, but also as co-con-

11 spirators; and there we have named Augusto Csear Kortright,

12 Santiago Olivero, and Joaquin Quinones.

13 In the determination of innocence or guilt
14 you must bear in mind, however, that guilt is personal. There
15 is no such thing in our law as guilt by association. The
16 guilt or innocence of each defendant on trial before you must
17 be determined by you separately with respect to that defendant,
18 solely on the evidence presented or the lack of evidence
19 in this case.

20 (continued on next page.)

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Let us turn now to the specific charge against these defendant s. Count 1 of the indictment charges a conspiracy It charges that all of the defendants named in the indictment, together ~~and with others to the grand jury unknown and known,~~ conspired to violate the federal narcotics laws. I shall refer to this count, count 1, as the conspiracy count.

In order to convict a defendant on count 1, the government must prove to your satisfaction beyond a reasonable doubt each of the following **elements**:

One, the existence of the conspiracy charged in the indictment.

Two, that a defendant knowingly and with willful intent joined the conspiracy with knowledge that its purpose was to violate the narcotics laws in the manner charged in the indictment.

Three, the commission by any conspirator of at least one of the ten overt acts set forth in the indictment.

I will now explain what these elements of the crime mean.

The first element of the crime is the existent of the conspiracy. What is a conspiracy? A conspiracy for our purposes, is simply a combination or an agreement amont two or more people to violate the law in the manner charged in the indictment. And here the defendants are

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charged with unlawfully willfully -- conspiracy to unlawfully, willfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment, and sale of a quantity of narcotic drugs, the exact amount and nature thereof being unknown to the grand jury, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the narcotic drugs had been imported and brought into the United States contrary to law, in violation of certain sections of the United States Code.

In short, these defendants are charged with a conspiracy, knowingly to deal in narcotics, knowing that they had been smuggled into the United States contrary to law.

The gist of the crime is the conspiracy. Thus a conspiracy is simply a combination or agreement, as I told you, among two or more people to violate the law. A conspiracy is kind of a partnership in a criminal purpose. The gist of the crime is a combination or agreement itself. This does not mean that two or more people must meet and sign a formal partnership agreement, or that they must sit down and agree in so many words on what their unlawful scheme is to be or how they are going to carry it out.

When persons enter into a combination or agreement to violate the law, obviously much is left to implication and to tacit understanding. Conspirators do not proclaim their plot or publicly announce their purpose. The very nature of the conspiracy usually calls for secrecy and intrigue.

The first element is satisfied, therefore, if you find beyond a reasonable doubt that any two or more people in any way intentionally combined or agreed to a common plan, knowingly and intentionally to accomplish the purpose of the conspiracy as alleged in this indictment.

Now, in determining whether there was such a combination, understanding or agreement, you should consider all of the evidence about each defendant's conduct, acts, and statements. You should consider not only what was said or done, but also how it was said or done. Actions speak louder than words. You should, therefore, ask yourselves whether the transactions here were conducted in a simple, straight forward manner, as innocent business transactions are, or whether they were purposely circuitous and devious: whether meetings were open or secret; whether the persons involved concealed or tried to conceal the nature of the transactions or to make them appear innocent; whether the identities of persons involved were concealed

2 in any way; whether they dealt in cash or other means of
3 untraceable money; and any other evidence which you recall
4 and believe as to the manner in which a defendant conducted
5 his affairs, and whether his dealings were open and above-
6 board; or whether they were surrounded by that secrecy and
7 intrigue which are the hallmark of a conspiracy.

8 From the point of view of the law there is
9 danger to the public when two or more people combine to
10 commit a crime. The danger is greater than if the lone
11 criminal acts by himself, because two or more are able to
12 accomplish crimes that are far more difficult, complex, and
13 harmful. Because of this a conspiracy to commit a crime is
14 a distinct crime in and of itself separate and apart from
15 the crime which it is the object of the conspiracy to accomplish.

16 Thus, you may find a conspiracy to exist, although
17 the purpose of the conspiracy is never accomplished. Here,
18 for example, there never need be any proof that either of these
19 defendants ever actually dealt in any narcotics, heroin or any
20 other. It is enough if there was an agreement to deal in it
21 and if they becomembers of the conspiracy knowing that that
22 was its purpose, and if one of the conspirators took some
23 step toward carrying that out, and we will discuss those
24 facts in a moment.

25

Proof, however, that the purpose of the conspiracy was accomplished is probably the most persuasive evidence of the existence of the conspiracy itself. The period of time charged in the indictment here runs from on or about January 1, 1968 and continuously thereafter up to and including January 1, 1973. It is not necessary for the Government to prove that the conspiracy alleged started and ended on those specific dates. It is sufficient if you find that a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment.

The second element in this crime of conspiracy which the Government is required to prove beyond a reasonable doubt is that a defendant joined the conspiracy with knowledge of its unlawful purpose. When I say "joined the conspiracy," I do not mean that the Government must prove that a defendant filed some kind of an application for membership.

However, before one can be found to be a member of a conspiracy, he must know of the existence of the conspiracy and its unlawful purpose, and he must voluntarily and knowingly join in the criminal venture with an intent to combine with others to violate the law. He

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2 must knowingly promote the scheme or have a stake in its
3 successful outcome. You will note that I have said that
4 a defendant must have acted knowingly, willfully and in-
5 tentiously. This does not mean that a defendant must be
6 aware that his conduct is criminal. It simply means that
7 he must have known what he was doing, that he was acting
8 freely and voluntarily, deliberately and on purpose and
9 not because of some mistake, accident, carelessness or
10 other innocent reason.

11 Here again, in determining the intent of the
12 defendant, it requires you to determine what was going on
13 in his mind, what was his state of mind. It is obviously
14 impossible to look into a man's mind. However, intent
15 and knowledge may be inferred from circumstantial evidence,
16 from the way a defendant acts, by his statements, and all
17 the surrounding circumstances.

18 Here again, the adage, "actions speak louder
19 than words," applies. The mere fact, however, that a defend-
20 ant may witness a crime or be present when a crime is
21 committed by others or that he may attend meetings, or that
22 he unwillingly assists in a criminal venture without knowing
23 what's going on, or that he associates or has a friendship or
24 some other business dealings with another member of a con-
25 spiracy is not in and of itself enough to make him a con-

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spirator, unless you first find beyond a reasonable doubt that he knew of the conspiracy and that he intentionally joined in it with the knowledge of its unlawful purpose and with a stake in its success.

One may become a member of a conspiracy without knowledge of all of the details or all of the operations of the conspiracy. One defendant may know only one other member of the conspiracy. Yet if he knowingly cooperates with others to further the illegal purpose of the conspiracy, with knowledge that others have combined to violate the law, he becomes a member, although his role may be only an insignificant or a subordinate one.

If you find that a defendant did join the conspiracy with knowledge of its illegal purpose, then he is bound by what others say and do to promote or further the venture, even though he himself is not present. Each conspirator is the agent or partner of every other conspirator. In determining whether a defendant did join a conspiracy, you cannot rely or base that decision on evidence of what others said or did. You must rely solely on the evidence of what the defendant himself said or did.

The third element of the crime is the commission by any conspirator of at least one overt act in furtherance of the object of the conspiracy.

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2 An overt act means an act by any member of the
3 conspiracy in an effort to accomplish some purpose of the
4 conspiracy. The reason the law of conspiray requires an
5 overt act is because a person may agree to commit a crime
6 and then change his mind. Therefore, before a defendant
7 can be convicted of conspiracy, one or more of the con-
8 spirators must have taken at least one step or performed
9 at least one single act which moved **directly** toward carry-
10 ing out the unlawful intent to commit the crime.

11 The Government has alleged ten overt acts in
12 this case, and you will note upon reading the indictment
13 that some of these acts are innocent in and of themselves.

14 Nevertheless, if those acts were performed
15 by any member of the conspiracy during the existence of
16 the conspiracy, and in furtherance of its purpose, then
17 those acts are sufficient to satisfy the third element.

18 The Government is not required to prove that
19 all of the overt acts **alleged were committed**. It is enough if
20 the Government proves beyond a reasonable doubt that at
21 least one of the overt acts was committed in furtherance
22 of the purpose of the conspiracy by any one or more members
23 of the conspiracy, whether or not the acting member is a
24 defendant on trial.

25 You will note also that the indictment alleges

that certain overt acts occurred on or about a certain date. The Government does not have to prove that the act happened on the exact date alleged. And this is also true later on when we discuss the substantive counts. It is sufficient if you find that the date mentioned in the testimony is within a few weeks of the date alleged. The same is true as to the places mentioned in the overt acts. They must be substantially similar.

There is no requirement that they be exactly those alleged. You must consider each defendant separately. If you find that the Government has failed to prove to your satisfaction beyond a reasonable doubt each of the three elements of the crime of conspiracy as I have defined them, then you must acquit the defendant whom you are considering on that count.

On the other hand, if you find that the Government has proved to your satisfaction beyond a reasonable doubt all three elements of the crime of conspiracy as I have defined them, then you should convict the defendant whom you are considering on count 1.

Counts 2, 3, 4 and 5 I shall refer to as the substantive counts. These counts also charge violations of the federal narcotics laws.

Thus, the defendants on trial, Trabacchi and Maher, are accused in one or more of the substantive counts

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2 of actually distributing various amounts of heroin. Counts
3 2 and 3 also charge the defendants Trabacchi and Maher with
4 aiding and abetting each other in distributing narcotics.

5 Before you may convict the defendants Trabacchi and
6 Maher on counts 2 and 3 and the defendant Maher on counts
7 4 and 5, the Government must prove to your satisfaction be-
8 yond a reasonable doubt each of the following elements:

9 One, that on or about the date specified in those
10 counts the defendant either received, concealed, sold, or
11 facilitated, that is helped, the transportation, concealment
12 and sale of a narcotic drug.

13 Two, that he did so unlawfully and knowingly. And
14 this simply means that you must be satisfied that he knew
15 what he was doing and that he did it deliberately and on pur-
16 pose and not because of mistake or careless or innocent reason.

17 Three, that the substance referred to in each of
18 those counts was in fact a narcotic drug, here, specifically,
19 heroin.

20 Four, that the heroin was illegally imported, in
21 other words, smuggled, into the United States.

22 Five, that the defendant knew that the heroin had
23 been illegally imported or smuggled into the United States.
24
25

As to the first element that the defendant either received, concealed, sold or facilitated the transportation, concealment and sale of a narcotic drug, it is not necessary for you to find that the defendant did all of those prohibited acts. If you are convinced beyond a reasonable doubt that he did any one of them and you find that the other elements existed, you may convict.

As to the third element, that the substance referred to in each of counts 2 through 5 was in fact a narcotic drug, I instruct you, as a matter of law, that heroin is a narcotic drug.

However, you must be convinced beyond a reasonable doubt that the narcotic drug charged to have been distributed in the count which you are considering was in fact heroin. The Government did not produce in court the heroin allegedly transferred in those four counts. There is no heroin in evidence in this case.

However, just as with any other element of the crime this element may be proved by other evidence and by circumstantial evidence, provided you are convinced beyond a reasonable doubt that the substance in question was heroin. Thus, there need be no sample placed before the jury, nor need there be testimony by a chemist, as long as the evidence furnishes a basis for inferring that the substance in question was heroin.

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2 In this connection the Government relies on the
3 testimony of among others, Doris Olivero, who said that she
4 was an addict and that many times she injected a white
5 powder which she had received from the defendants and that
6 the white powder was heroin.

7 There was also testimony of Detective Rainey that
8 he had applied the Marquis Reagent test and determined from
9 that that the substance in question was heroin. You should
10 also consider such evidence as you recall and believe as
11 to whether the transactions involving the substance in
12 question were open and aboveboard or secret and devious:
13 whether the substance was in fact a white powder; whether
14 the white powder was packaged, hidden or disguised in any
15 way as to conceal its true nature or as to make it appear
16 as some innocent commodity; whether exorbitant sums were
17 paid in cash for the white powder, and whether Olivero and
18 her husband purchased the substance as heroin and sold it
19 to customers as heroin.

20 As to the fourth and fifth elements, that the
21 heroin was illegally imported, that is, smuggled into the
22 United States, and that the defendant knew it had been
23 illegally imported or smuggled into the United States,
24
25

I am sure that you will note that there was no testimony in this case concerning the origin of the drugs or that the defendant Trabacchi or Maher knew of their origin.

Here the Government relies on the following principle of law: Even if this case were completely without any proof of defendant's knowledge of illegal importation, the law permits a jury, whenever it finds a defendant who had knowing possession of heroin, to draw an inference that the heroin was illegally imported, and further, that the defendant knew that it had been illegally imported. This means that if you find that a defendant had knowing possession of heroin and you see no satisfactory explanation for his possession, from all the evidence in the case, you may convict that defendant.

I want to tell you why a jury is permitted to draw such an inference. Recent official investigations and congressional findings indicate that all heroin found in the United States has been smuggled into the country because heroin is not produced here, and it is illegal to import heroin or products from which heroin is derived, except for medicinal use. From these facts it is reasonable to infer that any heroin found here has been illegally imported, and it is also reasonable and rational to infer that one who has unexplained possession and deals in

heroin would probably know its source or at least he would know that it had been smuggled here from somewhere outside the country, unless he deliberately closes eyes to the obvious.

While these official investigations and congressional findings furnish the basis upon which you may draw the inference flowing from the possession of heroin, the findings are not binding upon you and you are not compelled to draw the inference once possession is established. Whether or not you draw the inference to establish the elements of illegal importation and the defendants' knowledge of it is up to you, drawing upon your own knowledge, your own common sense and your own worldly experience.

In order to prove that a defendant had possession it is not necessary for the Government to prove that he personally handled or that he actually touched the narcotics, or that he had actual physical or manual possession. The law also permits you to find possession or to draw the inference of knowledge that the drugs were smuggled into the United States contrary to law, if you find that there was constructive possession. That simply means that if a person has such dominion or control over heroin or the power to control its disposition or to direct its movement or is able to assure that it will be delivered, even though he doesn't

physically handle it, he may be found to have constructive possession.

Now, with respect to the substantive counts, as I have told you earlier, counts 2 and 3 also charge the defendants Trabacchi and Maher with aiding and abetting each other in distributing narcotics. As to counts 2 and 3 it is not necessary for the Government to show that the defendant whom you are considering actually committed the crime charged in those counts.

The law provides that a person who aids and abets another to commit a crime is just as guilty of that crime as if he had committed it himself.

Accordingly, you may find a defendant whom you are considering guilty of the crime charged in count 2 and 3 if you find beyond a reasonable doubt that that defendant aided or abetted some other person in the commission of the crimes charged in those counts. Here the Government contends that Trabacchi and Maher aided and abetted each other in committing the offenses charged in those counts.

Before you can convict a defendant for aiding and abetting, however, you must find that the crime was committed by another and that the defendant whom you are considering consciously associated himself with the criminal venture with the intent that his conduct would help it succeed.

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2 You must be convinced beyond a reasonable doubt
3 that he was doing something to aid the crime or to forward
4 the crime of the other person, that he was a conscious,
5 knowing participant in the crime with a stake in its
6 success, rather than a mere witness, spectator or bystander
7 on the scene of a crime committed by another.

8 As to each of the substantive counts, counts
9 2, 3, 4 and 5, you should consider all of the evidence
10 as you recall it relating to each count and each defendant
11 named in that count. If you find that the Government has
12 failed to prove to your satisfaction beyond a reasonable
13 doubt each of the five elements which I have specified,
14 and with respect to counts 2 and 3 also fails to prove
15 that the defendant whom you are considering aided and
16 abetted another in the commission of the crime charged,
17 then you should acquit that defendant on that count.

18 On the other hand, if you find that the Govern-
19 ment has proved to your satisfaction beyond a reasonable
20 doubt all five elements or with respect to counts 2 and
21 3, has proved that the defendant whom you are considering
22 aided and abetted another in the commission of the crime
23 charged, then you may convict that defendant on that count.

24 You are instructed that the question of possible
25 punishment of the defendant in the event of a conviction

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is no concern of yours and should not in any sense enter into or influence your deliberations. The duty of imposing punishment in the event of conviction rests exclusively upon the Court. The jury's function is to weigh the evidence in the case as ~~it remembers~~ it and determine the guilt or innocence of the defendant solely on the basis of such evidence. When you retire to the jury room, treat one another with respect and consideration, as I know you will. If differences of opinion arise, your discussion should be dignified, calm, intelligent. Your verdict must be based on the evidence and the law, ~~the~~ evidence which was presented in this case as you remember it, and the law as I have given it to you in this charge. You are each entitled to your own opinion. No juror should acquiesce in a verdict against his individual **conscientious** judgment. Nevertheless, I would point out that no one should enter a jury room with such pride of opinion that no matter what, he would refuse to change his mind, no matter how intelligent or how convincing the arguments of another juror.

Discussion and deliberation are part of our American democratic jury process and you should approach your deliberations in that spirit and talk out your differences.

Each of you should in effect decide the case for him-

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self or herself after thoroughly reviewing the evidence and frankly discussing it with your fellow jurors with an open mind and with a desire to reach a verdict. If you do that, you will be acting in the true democratic process of the American jury system. There are twelve of you on this jury. The alternates will be excused before you retire for deliberations. Any verdict must be the unanimous verdict of all of you. And it must represent the honest conclusion of each of you as to the guilt or innocence of each defendant on each count in this indictment.

I submit the case to you with every confidence that you will fully measure up to the oath which you took as members of the jury, to decide the issues submitted to you fairly and impartially and without fear or favor.

Now, members of the jury, if you find that the Government has failed to establish the guilt of a defendant beyond a reasonable doubt, that defendant should be acquitted. If you find that a defendant has not violated the law, you should not hesitate for any reason to render a verdict of not guilty as to that defendant.

But on the other hand, if you find that the Government has established the guilt of a defendant beyond a reasonable doubt you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

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2 Your ~~Foreman~~ then will return an oral verdict
3 in open court of either guilty or not guilty as to each
4 defendant on each count where that defendant is named.

5 Are there any exceptions, gentlemen: If so,
6 I will hear you at the side bar.

7 MR. RUSSO: No exceptions, your Honor.

8 MR. BOBICK: No exceptions, your Honor.

9 THE COURT: All right. Swear the jury.

10 The alternates are excused.

11 (The four alternates were excused and left the
12 courtroom)

13 (At 12:47 one marshal was duly sworn)

14 THE COURT: Your lunch is here.

15 (At 12:47 p.m. the jury retired to deliberate)

16 THE COURT: I think you will be safe until
17 2:15 any way.

18 MR. BOBICK: Your Honor, I have a situation,
19 my associate came over from the State Supreme Court. I
20 have a prisoner in a cell who refuses to leave the cell
21 until he speaks to me. I am going to go over there and
22 try and catch him now. If I may be a little later I will
23 be here by 2:30.

24 THE COURT: It's all right with me except if
25 they come back with something. Can your client and you

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agree to have Mr. Russo or somebody represent you if the jury hands a note in your absence?

MR. BOBICK: Your Honor, I will be back by 2:15.

THE COURT: All right.

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2 (At 3:10 P.M. a note was received from the jury.)

3 (In the robing room.)

4 THE COURT: I got a note from the jury, "we are
5 tied up on count one, conspiracy. If we cannot come to a
6 decision on count one, / can we continue on count 2, 3, 4 and
7 5?"

8 The obvious answer that is yes.

9 MR. BOBICK: Your Honor, except that in order to
10 allow the testimony of or the statements that Doris made
11 concerning Santiago Olivero, wouldn't it be necessary for
12 them to show that there was a conspiracy first?

13 THE COURT: No.

14 MR. VICTOR: Certainly all of the statements which
15 she made with regard to the --

16 THE COURT: The answer to the question is yes,
17 gentlemen. If they can't reach agreement on one count
18 they can certainly consider the other.

19 MR. VICTOR: But I was thinking, in addition to
20 that possibly a special instruction with regard to the state-
21 ments made by the co-conspirator, Santiago Olivero.

22 Certainly while his statements may have been made
23 admissible on the conspiracy, they are certainly not admiss-
24 ible with regard to the substantive counts.

25 THE COURT: They were admissible on the conspiracy

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2 count.

3 "Do we have evidence that Doris Olivero's Cadillac
4 was seen At Manhattan Beer other than Dolores' car?"

5 I don't know what that means.

6 MR . BOBICK: I think that means other than
7 Dolores' testimony.

8 THE COURT: I don't know what it means, and I will
9 tell them I don't know what it means. It isn't clear. All
10 right. Call them in.

11 MR. BOBICK: I really don't want to press the point,
12 but I know that if they can't agree on one they certainly
13 should be able to go to the other counts. But the point is
14 that if they don't find that there was a conspiracy, then at
15 that point the hearsay statements that were admitted in evi-
16 dence should not be able to be considered.

17 If they cannot be considered, then the other counts,
18 they should not be considered in considering the guilt of
19 the defendants on the other counts.

20 THE COURT: The routine case where you get a failure
21 of proof on one count, it doesn't follow that the evidence is
22 inadmissible.

23 MR. BOBICK: Except that if the first thing that the
24 jury has to determine --

25 THE COURT: I will give them the Allen charge. That

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will take care of it, maybe. Get in there and agree on count one, if they can.

(In the courtroom in the presence of the jury.)

THE COURT: I have your note. Your second question isn't at all clear to me.

THE FOREMAN: You want me to ask it?

THE COURT: No; go back and send it again.

On your first question, you can proceed to the other counts, and then I think you should come back to count 1. Take it out, that's all. But you can proceed to the other counts.

THE FOREMAN: The other one we're not stymied. Do you want me to rewrite the second or not?

THE COURT: Yes. Rewrite the second. And any further notes, I don't want to know how you are standing or what your problems are, other than your questions.

(The jury Left the courtroom.)

(In the robing room.)

THE COURT: I have the other note. You were right. "Do we have evidence that Sam and Dolores' car was seen at Manhattan Beer, other than Doris' testimony?"

Answer, no. Is it all right with you if I write:

"No, there is no such evidence -- no other evidence; Judge MacMahon?"

MR. BOBICK: All right.

2 MR. VICTOR: All right.

3 MR. LAVIN: Yes, sir.

4 (Recess.)

5 (At 4:40 P.M. a note was received from the jury.)

6 (In the courtroom in the presence of the jury.)

7 (The roll was called - all present.)

8 THE CLERK: Mr. Foreman, has the jury agreed on a
9 verdict on counts 4 and 5 as to defendant Maher?

10 THE FOREMAN: We have. All of us have found the
11 defendant guilty on counts 4 and 5.

12 THE COURT: Have you been able to reach a verdict on
13 count 1 or counts 2 and 3?

14 THE FOREMAN: We have not been able to reach a
15 verdict.

16 THE COURT: On counts 1, 2 and 3?

17 THE FOREMAN: 1, 2 and 3.

18 THE COURT: The Court will excuse the jury and
19 declare a mistrial as to counts 1, 2 and 3 at this time.
20 You have had this case now for over 5 hours and you have been
21 unable to reach agreement; so I will declare a mistrial.

22 (The jury was discharged and left the courtroom.)

23 THE COURT: The motions on which the Court reserved,
24 in view of the verdict of no decision, in view of no verdict,
25 I will deny as of this time. So that will close that out.

The case will be reassigned to another Judge for retrial on counts 1, 2 and 3.

MR. BOBICK: Your Honor, we have a problem as far as bail is concerned. The defendant, your Honor, has brought out during the testimony that he is the father of two children and taking care of 4 more. He lives in Jersey.

While it's true he lives in Jersey, he's been in jail ever since his arrest. His financial condition is such that he is unable to make bail.

Would it be possible, your Honor, he does have in his name a home which has a mortgage on it at the present time, but could we let him out on personal recognizance bail? The testimony has been heard by the Court. The last act that this man is alleged to have committed was back in '69. His business has been closed up, he has a wife, 6 children, 2 of his own --

THE COURT: Can't he get a surety bond in some amount? It would seem to me with the property he has, he should be able to.

MR. BOBICK: Your Honor, the situation is , there is really not that. I can say this. I spoke to the sister. The place has been closed up with \$90,000 worth of judgments or lawsuits against it. I can show your Honor we served a subpoena on Rheingold Beer this morning, which was returnable

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2 this morning. Rheingold came in with their notices. At
3 the present time he is indebted to them for \$13,000 current.

4 Schaeffer served a summons for \$52,000. I haven't
5 received a reply from Miller as yet.

6 The man has debts amounting to over \$90,000 as I
7 know of. I know of \$52,000 and \$13,000, \$65,000 worth of
8 debts on the business alone from the two companies that I
9 spoke to.

10 There is no money. He is in jail. May I ask your
11 honor to set a personal recognizance bond? The property, the
12 house is in his name and his wife's name. But, your Honor,
13 I say it is heavily mortgaged. But could we have a personal
14 recognizance bond signed by him and his wife?

15 THE COURT: What do you say?

16 MR. LAVIN: Your Honor, the government feels that the
17 gail is very reasonable. You heard the testimony. This man
18 was a multi-kilo dealer in heroin.

19 THE COURT: The jury has just disagreed. It isn't
20 quite the same posture it was in before this trial.

21 MR. LAVIN: I don't really believe the jury was out
22 that long. They were out a little over 4 hours, approxi-
23 mately 4 hours, I believe.

24 THE COURT: I think the bail is excessive at
25 \$25,000. I will reduce it to \$10,000.

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2 MR. BOBICK: Yes, your Honor. Your Honor, could
3 I have the defendant paroled in my custody until tomorrow
4 morning and we will have a bond posted in the sum of \$10,000 --
5 I'm sorry -- 4:00 tomorrow afternoon, your Honor?

6 THE COURT: 4:00 tomorrow afternoon. I think not
7 on that, Mr. Bobick. I think I have lowered the bail. I
8 think that is reasonable. I don't like this defendant out on
9 a narcotics charge in a serious case such as this, without
10 bail.

11 MR. BOBICK: All right, your Honor. The new bail
12 now will be \$10,000 or surety bond.

13 THE COURT: Or surety bond.

14 MR. BOBICK: Yes, your Honor.

15 THE COURT: To be posted by 4:00 tomorrow.

16 MR. BOBICK: If your Honor sets the bail, he is in,
17 by such time as we post it.

18 THE COURT: All right. The case will be reassigned
19 to another judge by lot for trial.

20 MR. BOBICK: Not tomorrow morning, you didn't say.

21 THE COURT: I will turn it over to the assignment
22 committee. I don't know when the other judge will try it. He
23 will advise you. Now we have a sentencing problem as to the
24 other defendant.

25 MR. RUSSO: Yes, your Honor. First of all, I have

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an application that the defendant be continued on bail pending sentence and the present bail conditions, I believe, are a \$25,000 insurance company bond which has been posted with the Court.

Your Honor, during the court of all of the proceedings involved in these incidents, the three trials that we have referred to, the defendant has never failed to appear. One one occasion at the Brooklyn trial, your Honor, the defendant was facing a class A felony which carries a mandatory life sentence. He never failed to appear in any of the Brooklyn proceedings, your Honor.

He has appeared here during the course of this trial. Your Honor knows that he is a New York resident. Prior to this he's never been convicted of any crime.

I'd also like to cite another thing, your Honor. The defendant has a terminally ill mother. She is ravaged with cancer. I don't believe that she has an extensive period of time remaining. On top of that, his wife is ill with some uterine problems.

I would respectfully request, your Honor, that the bail conditions be continued. The person who put up the collateral security for the bond is his mother. She posted a substantial amount of cash in bankbooks with the bonding company. And I say, based upon that and also upon her

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condition, your Honor, the defendant should be continued in bail pending sentence.

MR. LAVIN: Your Honor, the government's position is that the defendant should be remanded. I think the testimony is he has been a very large seller of narcotics and his continued presence would indicate a danger to the community if he is still out.

THE COURT: I remand the defendant. The evidence before me does show in my opinion that he is a substantial dealer in narcotics, that he is a danger to the community.

MR. RUSSO: Your Honor, I'd only like to point --

THE COURT: Now that he faces a mandatory minimum of 5 years in jail on each of these counts, the risk of flight is great indeed, notwithstanding that he is married and has apparent roots in the community.

There isn't any question that the sums of money involved in these transactions were very large. This defendant had ready access at one time at least to \$8,000 to put up bail.

MR. RUSSO: Your Honor, perhaps the Court would like to hear the defendant on where the \$8,000 came from.

THE COURT: No, I don't care to hear the defendant on that at all.

MR. RUSSO: Perhaps I can inform the Court, your

1 Honor. That money was given to him by his mother, who owns
2 a bar and grill in the State of New York, in Bronx County.

3 THE COURT: There is nothing to prevent his
4 mother from giving him another \$8,000.

5 MR. RUSSO: Your Honor, there is no indication
6 this man is going to flee.

7 THE COURT: I deny the bail.

8 DEFENDANT MAHER: Your HOnor, I have a sick wife
9 and mother.

10 THE COURT: I'm sorry. So are all the people who
11 are addicted to narcotics ill, and so is the whole community
12 as a consequence of it.

13 I will set Tuesday, December 18, at 10:00 AM
14 for sentence.

15 MR. VICTOR: Your Honor, may counsel approach the
16 bench for one moment.

17 THE COURT: Surely.

18 (Pause.)

19 (Time noted: 5:50 P.M.)

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JUDGMENT AND COMMITMENT
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA,

v.

No. 73 Cr. 970

ROBERT MAHER

On this 18th day of DECEMBER, 1973 came the attorney for the government and the defendant appeared in person and by Steven Russo, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of distribution and possession with intent to distribute heroin. (Title 21, Sections 173 and 174, United States Code) as charged in counts 4 and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years, on each of counts 4 and 5 to run concurrently with each other and fined \$5,000.00 on each of counts 4 and

5 to run concurrently with each other. Total fine of \$5,000.00 to be paid or the defendant is to stand committed until the fine is paid or he is otherwise discharged according to law.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By /S/ E.A. Becker
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/S/Floyd F. MacMahon
United States District Judge

/S/Raymond F. Burchardt
Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
UNITED STATES OF AMERICA,

v.

ROBERT MAHER,

Action Number 73 Cr. 970
(LFM)

Defendant.

-----X

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Notice is hereby given that ROBERT MAHER, above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment convicting him of two counts of violating 21, U.S.C., §174 and the sentence thereupon of 10 years imprisonment and fine of \$5,000, sentences to run concurrently, dated December 18, 1973.

Dated: Dec. 18, 1973

Notice to:

/s/ Stephen A. Russo
Attorney for Robert Maher

Hon. Paul Curran
U.S. Attorney (S.D.N.Y.)

RUSSO, DUDIN & GOLDBERG
600 Third Avenue
New York, New York 10016

Mr. Robert Maher
c/o Fed. Det. H.Q.
427 West Street
New York, New York

Two(2)
Service of ~~three (3)~~ copies of the within
is hereby admitted

this day of

.....
Attorney(s) for

